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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

LEO GAGOSIAN FARMS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 83-CE-24-D (8 ALRB No. 99) 10 ALRB No. 39

DECISION AND ORDER

In accordance with the provisions of California Administrative Code, title 8, section 20260, Respondent Leo Gagosian Farms, Inc., Charging Party United Farm Workers of America, AFL-CIO, (UFW) and General Counsel have submitted this matter to the Agricultural Labor Relations Board (ALRB or Board) by way of a stipulation of facts and have waived an evidentiary hearing. Each party filed a brief on the legal issue, which concerns Respondent's technical refusal to bargain with the certified bargaining representative of its agricultural employees in order to seek a judicial review of the underlying representation proceeding in Leo Gagosian Farms, Inc. (1982) 8 ALRB No. 99, and the matter of an appropriate remedy for Respondent's denial of the validity of the Union's certification.

Pursuant to the provisions of California Labor Code section 1146,[1/] the Board has delegated its authority in this

[1/] All section references herein are to the California Labor Code unless otherwise specified.

matter to a three-member panel.

All parties agree that there is no dispute concerning the facts set out below. The UFW is a labor organization and Respondent is an agricultural employer within the meaning of the Act. On August 10, 1981, following the filing of a petition for certification by the UFW, 164 of Respondent's agricultural employees participated in a Board-conducted representation election with the following results: UFW, 84; No Union, 57; non-outcome-determinative Challenged Ballots, 23.

Thereafter, Respondent timely filed objections to the election, one of which was the subject of a 10-day evidentiary hearing before an Investigative Hearing Examiner (IHE) who recommended that the objection be dismissed and that the UFW be certified as the exclusive bargaining representative of the unit employees. Upon the filing of exceptions to the IHE's recommended Decision by Respondent, the Board considered the exceptions in light of the entire record and, on December 27,1982, affirmed the IHE's findings and recommendations. (Leo Gagosian Farms, Inc., supra, 8 ALRB No. 99.)

By letter dated January 12, 1983, the UFW invited Respondent to commence negotiations. On January 20, 1983, Respondent advised the UFW that it had not yet decided whether to challenge the Board's Certification Order. On February 9, 1983. Respondent informed the UFW that it had reached a decision regarding its position as to the validity of the underlying representation proceeding and that it would refuse to bargain in order to perfect a judicial appeal of the Board's ruling.

Accordingly, on February 17, 1983, the UFW filed the unfair labor practice charge in which it alleged that Respondent had refused to negotiate with its employees' chosen bargaining representative in violation of section 1153(e). That charge was the subject of a complaint which the Regional Director of the Board's Delano office issued on October 5, 1983, alleging that Respondent had refused to bargain collectively in good faith in violation of section 1153(e) and (a). The Regional Director requested, inter alia, that the Board direct Respondent to bargain in good faith with the UFW and make its employees whole for any loss of pay and other benefits resulting from Respondent's refusal to bargain. Thereafter, the parties entered into the afore-described stipulation of facts in lieu of an evidentiary hearing.[2/] Thus, the sole issue before the Board is the question of an appropriate remedy for Respondent's admitted "technical" refusal to bargain with the certified Union, which we find constitutes a violation of Labor Code section 1153(e) and (a).

In J. R. Norton Co. v. Agricultural Labor Relations Board (1979) 26 Cal.3d 1 [160 Cal.Rptr. 710], the Supreme Court enunciated

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[2/] A provision in the stipulated agreement authorizes the incorporation of Respondent's Exhibit D, an Offer of Proof by Respondent that if its president, Mrs. Margaret Gagosian, were called as a witness in a hearing, she would testify that immediately following the election, she personally learned that at least 45 eligible employees indicated that they would have voted in the election had they known about the election and believes that their participation would have affected the results of the election. Respondent contends that the value of such testimony would serve to underscore its good faith belief in the reasonableness of its present litigation posture. Be that as it may, however, such evidence would not establish misconduct which prevented the referenced employees from voting nor would it establish that the manner in which they might have cast their ballots would have affected the results of the election.

the standard for application of the makewhole remedy pursuant to section 1160.3 in "technical" refusal to bargain cases:

> . . . the Board must determine from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted ... it must appear that the employer reasonably and in good faith believed the violation would have affected the outcome of the election.

The Norton court cautioned against invocation of makewhole relief where such a remedy,

> . . . would impermissibly deter judicial review of close cases that raise important issues concerning whether the election was conducted in a manner that truly protected the employees' right of free choice.

In challenging the Regional Director's prayer for makewhole relief, Respondent does not seek to relitigate issues that were raised in the underlying representation hearing nor does Respondent now attempt to introduce previously unavailable or newly discovered evidence or extraordinary circumstances.[3/] Neither does Respondent rely on the merits of the objection which was the subject of the hearing except to the extent necessary to demonstrate a belief that its litigation posture is reasonable because it poses a close case concerning important issues.

Respondent asserts that its litigation is reasonable because the Board failed to acknowledge its own precedents governing

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[3/] Except insofar as Respondent seeks to preserve its right to pursue a judicial evaluation of two election objections which the Board declined to set for hearing.

the representativeness of elections in Leo Gagosian Farms, Inc. (1982) 8 ALRB No. 99. We disagree. Early in the history of the Act, we adopted the National Labor Relations Board's (NLRB) policy of setting aside elections where there is affirmative record evidence that eligible voters, sufficient in number to have affected the results of the election, were disenfranchised. (Hatanaka and Ota (1975) 1 ALRB No. 7,[4/] citing Alterman-Big Apple, Inc. (1956) 116 NLRB 1078 [38 LRRM 1406]; Repeal Brass Manufacturing Co. (1954) 109 NLRB 4 [34 LRRM 1277].) We subsequently made clear that we will not look to numbers alone to determine whether a vote is representative but will examine a potential question of disenfranchisement according to whether an outcome-determinative number of eligible employees were prevented from voting by conduct of a party or of the Board. (Pacific Farms (1978) 3 ALRB No. 75.)[5/]

The Decisions of both the Board and the Investigative

[4/] Hatanaka concerned the co-mingling of ballots of economic strikers with ballots of voters who were challenged on other grounds. Unable to separate out the striker ballots, the Board was forced to reject all challenged ballots, a number sufficient to affect the results and therefore require that the election be set aside.

[5/] In the Decisions of the Investigative Hearing Examiner and the Board in Leo Gagosian Farms, Inc. (1982) 8 ALRB No. 99, as well as the Official Tally of Ballots, the number of eligible voters was found to be 414. As Respondent pointed out, that figure corresponds with the average number of employee days in the payroll period preceding the filing of the representation petition whereas the number of employees who actually worked during the same payroll period; i.e., the statutory eligibility period, is 627. The disparity in the two sets of figures, standing alone, does not affect our Decision in 8 ALRB No. 99 or our Decision herein. As we explained in 8 ALRB No. 99, slip opinion at page 3, "An election is deemed to be representative where there is sufficient notice, the voters are given an adequate opportunity to vote, and there is no evidence of interference with the electoral process '[citation omitted]."

Hearing Examiner (IHE) in 8 ALRB No. 99 set forth in dramatic detail the extraordinary measures employed by the parties as well as by Board agents to attempt to disseminate word of the impending election to those grape harvest workers whom Respondent had laid off prior to the election.[6/] As fully discussed therein, the petition for certification satisfied all of the statutory and regulatory requirements for a proper and timely filing and the election was held in accordance with prescribed procedures and without incident. We note also that the Union had filed Notices of Intent to Take Access and Intent to Organize, and all indications are that it exercised both access and organizational rights in order to procure the requisite number of authorization cards in support of its petition for an election. Employees who subsequently were laid off certainly had some notice that an election was in

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[6/] At the time the petition was filed, on August 3, 1981, Respondent employed only one crew of approximately 50 workers, having just laid off more than 550 agricultural employees at season's end. Those workers were eligible to vote because they had been employed at some time during Respondent's pre-petition payroll eligibility period. Pre-petition employment is the only condition of eligibility in ALRB conducted elections and differs from NLRB practice where there are two conditions of eligibility: employment in the pre-petition eligibility period as well as on the day of the election. The single eligibility factor under our statute is a codification of the Legislature's recognition that the peak employment requirement for perfecting a certification petition often falls within a short window period followed, as here, by the seasonal departure of most if not all of a peak work force. Moreover, elections conducted pursuant to both the National Labor Relations Act and the Agricultural Labor Relations Act are decided by a majority of those actually voting, not by a majority of those eligible to vote. There is nothing in the statute or the Board's regulations which mandates that every eligible voter be personally apprised of an election or that all eligible voters cast ballots. It is sufficient if the Board agents exercise reasonable efforts to notice the election and there is no evidence that voters were prevented from voting by any party or the Board.

the offing. Moreover, Respondent appended notices of the forthcoming election to the payroll checks of at least 300 workers, a seemingly certain method of assuring that the notifications reached them.

More to the point, however, there is no showing of misconduct which would tend to prevent voters from exercising their franchise. Employees may have abstained from voting for a myriad of reasons other than notice, such as indifference, or other, personal factors beyond the control of the Board or any party.

As justification for challenging the appropriateness of the makewhole remedy, Respondent points to a potential four-vote difference in the Tally of Ballots between the pro-union and the no-union choices and asserts that on that basis it has established a "close case[s] that raise[s] important issues concerning whether the election was conducted in *a* manner that truly protected the employees' right of free choice." (J. R. Norton Co. v. Agricultural Labor Relations Board (1979) 26 Cal.3d 1, 39 [160 Cal.Rptr. 710].) Respondent's vote differential is obtainable only by hypothesizing that all of the challenged ballots, were they to be resolved and counted, would fall into the no-union column. Such a result, albeit an improbable one, would indeed present a close vote. However, we cannot from that proposition alone conclude that the major dispute herein, that of unrepresentativeness due to disenfranchisement, poses an equally close issue. Misconduct sufficient to set aside an election is that conduct which, by an objective standard, would tend to interfere with employees' free choice and thereby affect the results of the election. We cannot

believe that, on the facts present herein, Respondent could entertain a reasonable good faith belief that employees were disenfranchised, or that the Union could not have been freely selected by the employees because the election had not been properly conducted, or that there had been any misconduct by any party or the Board. Accordingly, we can only conclude that Respondent seeks to prolong this controversey in an effort to forestall its obligation to bargain with the chosen representative of its employees and to thereby thwart the purposes of the Act. (J. R. Norton Co. v. Agricultural Labor Relations Board, supra, 26 Cal.3d 1; George A. Lucas & Sons (1984) 10 ALRB No. 14.) We find therefore that Respondent's refusal to honor the Certification Order in 8 ALRB No. 99 is grounded on bad faith and thus a makewhole award is an appropriate remedy.

The makewhole period begins on January 15, 1983, three days from the date the UFW first mailed Respondent a request to commence negotiations. As Respondent's obligation to bargain with its employees' certified representative began upon receipt of the UFW's letter, the remedy to correct Respondent's failure and refusal to discharge that obligation should appropriately take effect as of that same date. In accordance with the terms of California Administrative Code, title 8, section 20480, mail is presumed received three days from mailing (or, if the third day falls on a Sunday or a legal holiday, on the next regular business day). (See, e.g., Frudden Enterprises (1983) 9 ALRB No. 73; George A. Lucas & Sons, supra, 10 ALRB No. 14.)

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ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Leo Gagosian Farms, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in section 1155.2(a) of the Agricultural Labor Relations Act (Act), with the United Farm Workers of America, AFL-CIO, (UFW) as the certified exclusive collective bargaining representative of its agricultural employees.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employees in the exercise of the rights guaranteed by section 1152 of the Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees and, if an agreement is reached, embody the terms thereof in a signed contract.

(b) Make whole its present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's failure and refusal to bargain in good faith with the UFW, such makewhole amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and

Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55, the period of said obligation to extend from January 15, 1983, until November 7, 1983, the date on which the statement of facts was first signed by one of the parties, and continuing thereafter until such time as Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

(c) Preserve and, upon request, make available to the Board and its agents, for examination, photocoyping, and otherwise copying, all records in its possession relevant and necessary to a determination, by the Regional Director, of the makewhole period and the amounts of makewhole and interest due employees under the terms of this Order.

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from January 15, 1983, until the date on which the said Notice is mailed.

(g) Provide a copy of the attached Notice in the

appropriate language, to each agricultural employee hired by Respondent during the 12-month period following the date of issuance of this Order.

(h) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at times(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice and/or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(i) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

IT IS FURTHER ORDERED that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative of Respondent's agricultural employees

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be, and it hereby is, extended for a period of one year commencing on the date on which Respondent commences to bargain in good faith with the UFW.

Dated: August 14, 1984

JOHN P. MCCARTHY, Member

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

MEMBER CARRILLO concurring:

I agree with the majority that the makewhole award is appropriate in this case. However, I disagree with the majority's analysis for making the award. In my view, the Agricultural Labor Relations Board (ALRB or Board) correctly certified the United Farm Workers of America, AFL-CIO (UFW or Union) in the underlying representation case, Leo Gagosian Farms, Inc. (1982) 8 ALRB No. 99, but I believe the Board employed the wrong standard in doing so. The proper standard in the underlying representation case should have been whether the notice procedures utilized were such that most of the workers eligible to vote were likely to have actually received or were in a position to have received notice of the election. Only if the notice procedures were thus adequate can the turnout, even if low, be deemed to be representative. Our inquiry in elections where there is low voter turnout should not focus strictly on the reasonableness of Board agents' efforts to give as much notice

to eligible voters as possible under the circumstances but instead should focus on whether the circumstances were such that the notice procedures are likely to have given or could reasonably be expected to have given notice of the election to most of the eligible voters. If Board agents and parties made every effort possible under the circumstances to give notice of the election, as did the Board agents and parties in this case, but such efforts nonetheless failed to reach a majority of eligible workers who left the area prior to the election petition being filed, I would set aside the election. It is the eligible voters' right to receive notice, and the opportunity to vote, that the Board must zealously protect, and not the integrity of the Board agents' efforts in giving notice of the election to workers.

I believe that in theory the Employer's argument is a reasonable one. An election petition filed five days after a layoff of over 90 percent (575 to 585 workers) of the 627 eligible voters raises difficult notice problems inherent in California's seasonal and migratory work force. The Agricultural Labor Relations Act's election procedures are tailored to the recognition that agriculture is dominated by a short peak season, necessitating the holding of elections within seven days of the filing of the election petition. (Labor Code sections 1156 through 1159.) The Board has recognized that the work force is mobile and migratory and that traditional methods of communication with agricultural workers are by and large inadequate, placing a premium on worksite access as an effective means of communication. (See Agricultural Labor Relations

Board v. Superior Court (1976) 16 Cal.3d 392.) At the same time, however, the legislature has taken pains to insure that seasonality and work force migration should not place insuperable barriers to organizing. An agricultural operation need only be at 50% of peak employment to be valid and all agricultural workers employed by an employer are included in the unit certified, even if only a relatively small percentage actually had the opportunity to vote. (Labor Code section 1156.4.)

When a petition for election is filed after over 90 percent of the work force has been laid off, the possibility is great that a large number of eligible voters will have dispersed to other areas and will thus not be likely to receive or be in position to receive notice of the election.

I agree that it is not necessary nor realistic to require that Board agents give each individual eligible voter actual notice of the election. If the notice procedures are such that it can reasonably be inferred that most of the voters were likely to have received or could have received notice of the election, the fact that individual workers actually did not receive notice or for personal reasons could not vote in the election should not defeat the opportunity for the rest of the work force to exercise their right to vote. However, this is quite different from the situation where a majority of the work force is laid off and leaves the area before an election petition is filed; in the latter case, the Board's notice procedures would be unlikely to provide notice to the departed eligible voters. Worker migration from an area after completion of the work season

is common in agriculture and cannot be equated with other "personal reasons" by which workers may place themselves beyond the reach of adequate notice procedures. This is one of the reasons why the ALRA's procedures are different from those of the NLRA. In my view, a voter turnout of 26 percent, where 90 percent of the work force was laid off before the filing of the election petition suggests that, given the seasonal and and migratory nature of the work force, the notice procedures might well have been inadequate.

While I believe that in theory the Employer's position has some merit, the facts of this case amply support the finding that most of the eligible voters actually received or were in a position to receive notice under the notice procedures used. The evidence shows that of 627 eligible voters, 218 eligible voters were considered "local" residents while 409 were considered "out-of-town" residents.[1/] With regard to the local residents, every kind of effort possible was made to provide notice: 40 to 50 workers still working for the Employer were given actual notice of the election; Board agents, Employer representatives, and Union representatives made home visits; the Employer distributed campaign flyers along with payroll checks (an almost sure means of giving notice of the election to voters) to 167 of the 218 local residents; and the Board, Employer and Union aired a vast number of radio spots announcing the election date,

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[1/] The local resident workers were in the crews of foremen Domingo Ruperto, Jr., Augusto Madera, Pete Gagosian, Bill McClean and A. Mijarez. The out-of-town resident workers were in the crews of foremen Manuel de Macabalin and Clay Ancheta.

times, and location. No evidence was introduced to suggest these local residents left the area after their layoff from work. Under the circumstances, the evidence overwhelmingly supports the finding that the notice procedures used gave notice to all of the eligible voters who were local residents.

Of the 4-09 eligible voters who were considered out-of-town residents, 153 of them worked in foreman Manuel de Macabalin's crew. On August 5, 1981, Macabalin was advised by the Employer's labor consultant of the possibility of an election on August 10 and was given campaign flyers to distribute along with the workers' payroll checks. Macabalin was also asked to give his workers notice of the election. Approximately 40 of his crew members were working with him at Tenneco West. Thus, although the 153 eligible voters in Macabalin's crew were not local residents, the evidence amply supports the finding that these workers in fact received notice of the election when they contacted Macabalin to receive their payroll checks. No evidence was introduced to show that they left the area prior to the election and hence were unable to vote. On the contrary, 40 workers were working at Tenneco West and all of them had to maintain enough contact in the area with Macabalin to receive their checks as of August 5, at least seven days after the layoffs. The evidence therefore supports the finding that the 153 eligible voters in Macabalin's crews received notice and were thus given an opportunity to participate in the election.

One hundred forty-six eligible voters considered as out-of-town residents were members of foreman Elias Davila's

crew. Davila testified that after the layoff most of his crew remained in the area looking for work. Davila's assistant, Erasmo Flores, testified he was able to contact 40 workers in his crew and notify them of the upcoming election. Thirty-four of the Employer's witnesses at the hearing were from Davila's crew. Although they all testified they did not receive notice of the hearing, 28 of them testified they were still in the area, many of them still residing at the same locations where they lived while working for Employer. There was testimony from 5 employees that 13 employees moved out of the area after their work with the Employer was completed, but there was no other testimony indicating the whereabouts of the remaining members of the crew. Given Davila's testimony that workers remained in the area to look for work, coupled with evidence that 78 of the 14.6 eligible voters were in the area during the election period and thus were subject to the extensive notice procedures utilized by the Board and the parties, it must be held that a majority of those employees were given adequate notice of the upcoming election.

One hundred and ten eligible voters, considered out-of-town residents, belonged to the crew of Clay Ancheta. No evidence was offered as to whether these workers remained or left the area after their work for the Employer. We can only speculate as to whether they did or did not leave the area or did not vote for other, personal reasons.

To summarize, it is clear that the 218 eligible voters who were local residents and 153 members of Macabalin crew, or a total of 371 eligible voters, received adequate notice through

the notice procedures used by the Board and the parties. Additionally, the majority of another 146 eligible voters belonging to Elias Davila's crew must be considered to have received or have been in a position to receive notice through the procedures used. In the final analysis, where the notice procedures provided notice to approximately 517 of 627 eligible voters, and where the evidence is silent as to the situation involving notice to the remaining 110 employees, the election cannot be set aside merely because the turnout may have been low. Therefore, I believe the Employer is pursuing a legal theory not supported by the facts in this case and that his litigation posture cannot be deemed to be reasonable. I concur that the makewhole remedy is appropriate in this case.

Dated: August 14, 1984

JORGE CARRILLO, Member

NOTICE TO AGRICULTURAL WORKERS

A representation election was conducted by the Agricultural Labor Relations Board (Board) among our employees on August 10, 1981. The majority of the voters chose the United Farm Workers of America, AFL-CIO, (UFW) to be their union representative. The Board found that the election was proper and officially certified the UFW as the exclusive collective bargaining representative of our agricultural employees on December 27, 1982. When the UFW asked us to begin to negotiate a contract, we refused to bargain so that we could ask the court to review the election. The Board has found that we have violated the Agricultural Labor Relations Act (Act) by refusing to bargain collectively with the UFW. The Board has told us to post and publish this Notice and to take certain additional actions. We shall do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. to decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL, on request, meet and bargain in good faith with the UFW about a contract because it is the representative chosen by our employees.

WE WILL reimburse each of the employees employed by us at any time on or after January 15, 1983, during the period when we refused to bargain with the UFW, for any money which they may have lost as a result of our refusal to bargain, plus interest.

Dated: Leo Gagosian Farms, Inc.

By: _____
(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 627 Main Street, Delano, California 93215. The telephone number is (805) 725-5770.

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT FOLD OR MUTILATE

CASE SUMMARY

LEO GAGOSIAN FARMS, INC.

10 ALRB No. 39
(8 ALRB No. 99)
Case No. 83-CE-24-D

Background

On December 27, 1982, the Board certified the United Farm Workers of America, AFL-CIO (UFW or Union) as the exclusive bargaining representative of all agricultural employees of Leo Gagosian Farms, Inc. (1982) 8 ALRB No. 99. Thereafter, on January 12, 1983, the UFW served on Respondent a request to commence negotiations towards a comprehensive collective bargaining agreement. On February 9, 1983, Respondent advised the Union of its belief that the low voter turnout resulted in an unrepresentative election and therefore that the Board's certification Order in 8 ALRB No. 99 was not valid. Accordingly, Respondent asserted a "technical" refusal to bargain in order to perfect a judicial challenge to the election. The Union then filed an unfair labor practice charge, alleging therein an unlawful refusal to bargain.

Board Decision

Based on the stipulation of facts and legal arguments submitted by the parties, the Board decided that Respondent's admitted failure to bargain was not based on a reasonable good faith belief that the Union had not been freely selected by the employees. The Board found that the election was held in accordance with prescribed procedures and without incident and that there was no evidence showing that prospective voters did not participate in the election because they had not received notice of the election or that they had been prevented from voting by misconduct of the Board or any party. Accordingly, the Board issued an Order, including a makewhole provision, to remedy Respondent's violation of Labor Code section 1153(e) and (a).

Concurring Decision

Member Carrillo agreed that the underlying election which Respondent is contesting was properly certified but disagreed as to the standard utilized for doing so. Where an election has a low voter turnout, Member Carrillo believes that the standard should focus on whether the notice procedures utilized were such that most of the workers eligible to vote likely received or were in a position to receive notice of the election, rather than whether the Board agents gave as much notice as reasonably possible under the circumstances. After reviewing the notice procedures given by Board agents in this election case, Member Carrillo concludes that the procedures used did in fact provide adequate notice to eligible voters, and that the facts do not support Respondent's litigation posture. The makewhole award is therefore appropriate.

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